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**Testimony of Edward Vopal
on behalf of the
Wisconsin Association for Justice
before the
Committee on Judiciary, Utilities, Commerce,
and Government Operations**

**Sen. Rich Zipperer, Chair
on
2011 Special Session Bill 14
October 26, 2011**

CHAIRMAN ZIPPERER AND MEMBERS OF THE COMMITTEE,
my name is Edward Vopal. I am a partner in the Habush, Habush &
Rottier, S.C. law firm in Green Bay, Wisconsin and the president-elect of the
Wisconsin Association for Justice (WAJ). Thank you for the opportunity to
testify against Special Session bill 14.

WAJ supports the work of attorneys to ensure any person harmed due
to injury by the misconduct or negligence of others can have a fair day in
court, even when taking on the most powerful interests.

WAJ opposes Special Session bill 14, which changes the interest rate
only on tort and consumer judgments and settlement offers from the current
12 percent rate to a rate of prime plus one percent, which would currently be
4.25 percent. Special Session bill 14 would produce a reduction of 7.75
percent on tort and consumer judgments.

WAJ is particularly troubled by the singling out of only tort and
consumer cases for this lower judgment rate. It is not fair that a person

injured as a result of an automobile accident or who has been defrauded by a business deserves a lower interest rate than a bank or credit card company suing a debtor for nonpayment of a loan. It is completely inequitable to single out injured citizens in this fashion. A judgment based on a wrongful action should not be distinguished from any other type of judgment.

One of the biggest beneficiaries of this change would be insurance companies. Individuals, families and businesses buy insurance for protection in the event of an unfortunate event. They pay premiums in a timely way with the expectation that their insurer will respond with the same timeliness in the event of a claim. Not all insurance companies pay claims promptly.

Current law in Wisconsin provides an incentive to timely pay valid claims. Special Session bill 14 will change that incentive, setting an artificially low rate of interest for tort and consumer judgments, making it easier for insurance companies to deny or delay payment on claims to the detriment of the consumer.

An insurer would be allowed to delay payment, invest the funds due the the claimant, and make more money even if it loses its case in court. For the claimant, however, delay increases the financial loss. While awaiting their day in court, claimants often need to cover ongoing medical bills and lost wages by borrowing against credit cards or home equity loans, rarely if ever receiving favorable prime plus one percent interest rate on that loan. Quite simply, the insurance industry can afford to fight policyholders until they walk away or accept considerably less than the benefits to which they are entitled.

In addition, if the injured person is not able to pay their medical bills and the insurance company is not settling a case, a healthcare facility, business or government entity, could recover a judgment against the person and receive 12 percent interest. At the same time, the injured person can only recover 4.25 percent from the insurance company who is refusing to settle the case. This situation is patently unfair.

The current interest rate of 12 percent also discourages unwarranted appeals and encourages prompt payment of legitimate claims. Under Special Session bill 14, interest rates will be so low that it may encourage more

appeals of legitimate verdicts. If the interest rate on judgements is not high enough and the wrongdoer can reap a greater return on its money through other investments, there is an increased monetary incentive to appeal the case or delay the settlement process, even if there is little chance that the judgment will be overturned or modified.

The Wisconsin Legislature has chosen to eliminate usury laws for corporations. Interest rates consumers pay on credit cards is usually well over 12 percent, many are between 14 and 18 percent. No attempt has been made to regulate credit card interest rates. Nor has the Legislature chosen to regulate payday loan rates. Recently, the Wisconsin Supreme Court accepted a case that will decide if payday loan rates of 446 to 1388 percent are unconscionable. Instead, the Legislature is choosing to limit the interest rate of someone who has suffered an injury and actually has a valid judgment against a wrongdoer. This proposal seems illogical.

The proposed rate in this bill is also very low compared to what the Legislature requires from delinquent taxpayers. By statute, the Legislature requires delinquent taxpayers to pay one percent interest per month or 12 percent at year, plus cities, counties and the state can assess a .5 percent penalty a month. This interest rate structure reflects a total payment of 18 percent a year. Wis. Stat. § 74.47.

If cities, counties, the state, and all other civil judgments can charge 12 percent interest a year, the judgment rate for tort or consumer claims should not be any different. To do otherwise is unfair and unjust. We urge the committee not to pass Special Session bill 14.

BANKRUPTCY, INSOLVENCY & CREDITORS' RIGHTS SECTION

Statement of Attorney Leonard G. Leverson Concerning SB 14 and AB 14

My name is Len Leverson. I am a bankruptcy and creditors' rights lawyer in Milwaukee and co-chair of the Legislation Committee of the Bankruptcy, Insolvency, and Creditors' Rights ("BICR") Section of the State Bar of Wisconsin. The BICR Section consists of lawyers who practice debtor-creditor law. Some of us represent debtors; some of us represent creditors; some of us represent both. The BICR Section Board has voted unanimously to oppose SB 14 and AB 14.

The main problem with the bill is its proposed disparate treatment of tort and consumer protection law judgments from other types of judgments. The proposed bill would leave the current judgment interest rate of 12% in place for most judgments, but reduce it to the prime rate plus 1% for tort and consumer protection law judgments.

The disparate treatment of different types of judgments is both unfair and impractical to administer. A drunk driver, found civilly liable to his victims for negligence, would pay the prime rate, plus 1%, on the judgment against him – as would, for that matter, embezzlers, defrauders, and murderers, the civil claims against whom are tort claims. Meanwhile someone who lost his or her job and simply could not repay a loan would pay 12% interest on a contract judgment. Moreover, ascertaining the appropriate interest rate on a judgment would become more complex to determine. It would no longer be possible to calculate the postjudgment interest due merely by looking at the date of the judgment and adding on 1% simple interest per month. First one would have to determine what kind of claim the judgment was for. This is not always easy to do. Frequently, lawsuits assert both contract claims and tort claims. Determining the basis for a judgment at a minimum requires reviewing the pleadings in the case, and in some cases could be impossible. (For example, in some cases, a plaintiff's claims could be submitted to a jury under both tort and contract theories, and the jury could render a general verdict. In this situation there would literally be no way to determine whether the judgment was for breach of contract or for liability for tort.)

An additional administrative difficulty is tying the proposed rate for tort and consumer protection law judgments to the prime rate on the day the judgment is issued. Again, the prime rate in effect on the date of the judgment is not information that is readily apparent from the face of the judgment itself. A fixed rate would be preferable.



STATE BAR OF WISCONSIN

While the BICR Section Board opposes complicating the calculation of judgment interest rates, especially in the unfair manner proposed, we would agree with and support a change in the law that would lower interest rates on judgments, generally. In today's low interest rate environment, twelve percent interest is very steep. And interest on judgments has not always run at 12% in Wisconsin. Before May 11, 1980, the postjudgment interest rate was fixed by statute at 7%. (Chapter 271, section 5, Laws of 1979, changed this effective as to lawsuits filed on or after May 11, 1980.) Before November 24, 1971, interest on judgments ran at 5%, which remains the so-called "legal" or prejudgment interest rate in Wisconsin. Today mortgage interest rates are at lows not seen since the 1950's, passbook savings accounts pay very little interest, and the federal government is able to borrow money at extraordinarily low interest rates. Inflation is very low, and many assets, such as houses, continue to decline in value. Twelve percent interest was necessary to counteract inflation, and to provide some modest incentive for judgment debtors to pay their just obligations, back in the 1980's. Today twelve percent interest is punitive. A flat lower rate, perhaps 6% or 8%, would be sufficient to compensate judgment creditors for the delay in payment, while still providing an incentive for judgment debtors to pay up. Wisconsin increased judgment interest rates to keep pace with the market back in 1971 and again in 1980. It's time to ratchet them back down. But let's do so in a fair way and a way that is easy to administer, with one fixed rate applicable to all judgments.

For additional information contact Cale Battles, Government Relations Coordinator, at (608) 250-6077 or cbattles@wisbar.org.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone

**WRITTEN TESTIMONY OF CHRISTOPHER E. APPEL, ESQ.
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**ON BEHALF OF THE
AMERICAN TORT REFORM ASSOCIATION**

**SUPPORTING A.B. 14, AN ACT TO AMEND THE INTEREST RATE
ON JUDGMENTS IN CERTAIN CIVIL ACTIONS**

**BEFORE THE WISCONSIN
ASSEMBLY JUDICIARY COMMITTEE**

OCTOBER 21, 2011

Mr. Chairman and Members of the Committee, I am appearing on behalf of the American Tort Reform Association (“ATRA”) to express ATRA’s support for A.B. 14. Wisconsin law relating to the interest on judgments presently far exceeds prevailing interest rates, placing an undue burden on litigants. This burden is punitive in nature, and imposes a level of punishment unconnected to any specific wrongful conduct which is the traditional lynchpin for punitive recovery. A.B. 14 corrects this unfair result by providing a more reasonable determination of the judgment interest rate.

Background

I am an associate in Shook, Hardy & Bacon L.L.P.’s Washington, D.C.-based Public Policy Group. My work focuses primarily on tort law and civil justice system reform; it is generally divided among legislative efforts, appellate litigation, and academic writing. I received my J.D. from Wake Forest University School of Law and my B.S. from the University of Virginia’s McIntire School of Commerce.

ATRA’s Interest

Founded in 1986, ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA believes that the current law in Wisconsin regarding judgment interest unfairly exceeds prevailing interest rates and imposes a punitive burden on businesses. ATRA believes that A.B. 14 is sound legislation which responds to an imbalance in the civil justice system and promotes fair compensation.

A.B. 14 Would Promote Fair Interest on Wisconsin Judgments

Litigants in Wisconsin who win favorable judgments are often entitled to recover interest on the damages they are awarded to account for the time delay in receiving monies owed to them. Such recovery may come in the form of pre-judgment interest (*i.e.* interest from the time a harm is suffered or claimed until the judgment is awarded) or post-judgment interest (*i.e.* interest for the time spent appealing a judgment). The basic reason for this recovery is the “time value of money,” which reflects the notion that getting a dollar today is generally worth more than getting a dollar tomorrow because of a number of factors, for example, inflation.

For over a century, Wisconsin has statutorily prescribed a rate of interest which may be applied to a judgment to compensate for the time value of money. *See Laycock v. Parker*, 79 N.W. 327, 333 (Wis. 1899) (discussing 1858 law). Over time, this rate of interest has been amended to conform to changing times and greater development in how such rates should be constructed and applied. Currently, Wisconsin law states that the judgment interest rate is a strict 12% per year where a verdict has been entered or where a judgment exceeds the amount offered to settle a case. This chosen rate, like any legislatively determined rate, is inherently arbitrary; it is designed to provide fair compensation to litigants vindicating their rights. What it is not designed to do is provide litigants with a windfall recovery; however, the application of the law today does precisely that.

For example, in times where prevailing annual interest rates are at historic lows, say 3%, a defendant owing judgment interest in Wisconsin would owe 12%, or quadruple this amount. Thus, as a practical matter, the unsuccessful litigant would pay a 400% mark-up or premium on the judgment interest annually, which can have the effect of substantially overcompensating the successful litigant for the time value of money.

When judgment interest does not fairly reflect the actual time value of money, the excess amount paid in interest essentially acts as a penalty. Because an award of judgment interest is generally unrelated to the merits of a claim or conduct of the parties, the result is a form of punishment that is unconnected to any willful, wonton, or reckless misconduct. Such intentional action is traditionally a prerequisite for allowing punitive recovery. Hence, with an unbalanced and inflated rate of interest on judgments, a tort case involving a simple slip and fall would give rise to a measure of punitive damages. Conversely, a tort case in which punitive damages were appropriately awarded based on the defendant's willful misconduct would give rise to a measure of double punishment that is similarly unjust.

The fundamental purpose of A.B. 14 is to more closely place each party in the same position they would have been but for the time spent litigating a matter. A related objective is to not penalize civil defendants merely for asserting their legal rights. Indeed, as Wisconsin courts have made clear, "prejudgment interest is not a penalty," and the purpose of statutes awarding judgment interest is "not punitive." *Erickson v. Gundersen*, 515 N.W.2d 293, 301 (Wis. Ct. App. 1994). A.B. 14 would reduce the potential for Wisconsin courts to unfairly award damages that are punitive in nature where there is no wrongful conduct or where punishment has already been meted out by the court. It would accomplish this simply by reducing the current, arbitrary 12% annual rate to a more reasonable 1% increase above the Federal Reserve Board Prime Rate. This would ensure that successful litigants are being fairly compensated for the time value of money, as the rate would remain above the Prime Rate (which already accounts for inflationary pressures), but that they are not being overcompensated. This also safeguards litigants from being undercompensated in times where interest rates are particularly high (i.e. above 12%), such as they were during the late 1970s and early 1980s.

In addition, A.B. 14 would position Wisconsin closer to the mainstream in terms of how judgment interest is awarded. Currently, Wisconsin has one of the highest statutory interest rates in the country, and is in the minority by not pegging its judgment rate with a variable market rate, for example the Prime Rate. In comparison to nearby states such as Minnesota, Iowa, Illinois, Michigan, and Indiana, Wisconsin boasts the highest non-indexed interest rate on judgments.

While I believe A.B. 14 represents sound public policy and, for all of the above reasons, should be enacted, it is my understanding that there may be concerns with its scope and how the applicable interest rate would be calculated. Presently, the bill would apply to tort and consumer protection cases, but not other types of civil actions such as contract disputes. From an overall policy perspective, there is nothing objectionable to extending the bill's scope to generally apply to any civil action just as there is nothing objectionable to taking a more piecemeal approach as the current bill does. Some states, for example Colorado, Missouri and New Mexico, have different rates apply to different types of actions, such as contract and tort. This is simply a legislative approach where reasonable minds may differ.

The second potential concern I wanted to address relates to the timing of the calculation for judgment interest. A.B. 14 would apply the prevailing interest rate (Prime Rate + 1%) on the day the judgment is entered. Although very accurate in terms of the applicable rate, this could result in an administrative burden for the courts in potentially having to apply a different interest rate every day. It could also, as a practical matter, prompt litigants to engage in maneuvering to impact the precise day the judgment is entered. For instance, a change of even 25 basis points in a day could be significant, particularly in cases involving substantial sums of money that have gone on for years. To make the interest determination more manageable, this Committee might

wish to consider options that periodically establish the applicable judgment interest rate. Three such options include: 1) a rate set annually (e.g. Jan. 1 of each year); 2) a rate set semi-annually (e.g. Jan 1 and June 30); or 3) a rate set monthly (e.g. the last day of the month preceding the judgment). Obviously, reasonable minds can differ on the best way to proceed here as well to balance the burden on the courts and fairness to litigants.

Conclusion

Wisconsin law should be amended to more fairly compensate successful litigants by tying the rate of judgment interest to the Federal Reserve Board Prime Rate. A.B. 14 would accomplish this basic goal and remove the unjust and punitive effects of the state's high, static statutory rate. If enacted, litigants would no longer be arbitrarily penalized merely for resolving to assert their legal rights in court.



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Promoting Fairness and Equity in Wisconsin's Civil Justice System

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MEMORANDUM

To: Members, Senate Committee on Judiciary, Utilities, Commerce, and Government Operations

From: Andrew Cook, on behalf of Wisconsin Civil Justice Council

Date: Wednesday, October 26, 2011

Re: **Special Session Assembly Bill 14 /Senate Bill 14 – Setting Reasonable Interest on Judgments**

Special Session Assembly Bill 14/Senate Bill 14 reforms Wisconsin's high pre- and post-judgment interest from 12 percent to the prime rate set by the Federal Reserve Board, plus one percent. This ensures that plaintiffs do not receive a windfall, while also ensuring that defendants pay a reasonable interest rate.

Current Wisconsin Law

Under current law, plaintiffs in Wisconsin who win favorable verdicts are usually entitled to recover interest on the damages awarded. Some of this is in the form of post-judgment interest, which is meant to compensate the plaintiff for loss of the use of money while a defendant appeals a judgment. Plaintiffs may also be awarded pre-judgment interest, which runs from the date the plaintiff makes an offer of settlement, rather than the time damages are awarded by a court.

Wisconsin currently imposes an interest rate of 12 percent on both pre- and post-judgments, which is among the highest in the nation. If the plaintiff offers a settlement that the defendant does not accept and the judgment is larger than the offer to settle, the plaintiff is entitled to pre-judgment interest from the time the plaintiff made the offer to settle at a rate of 12 percent.

Wisconsin's High Interest on Judgments Should Be Lowered to Reflect Current Interest Rates

Although well-intended, Wisconsin's current law has the unintended consequence of overcompensating the plaintiff, holding a defendant financially responsible for delays in the court process the defendant may have not caused, and ultimately impeding settlement.

Wisconsin should therefore adopt legislation which sets the rate at a reasonable level. Instead of allowing an exorbitantly high interest rate of 12 percent, which far exceeds any available market rate, Special Session AB 14/SB 14 adopts an interest rate applicable to all judgments that is equal to the prime rate set by the Federal Reserve System plus one percent.

Today, a 12 percent interest rate is excessive and unfair. A defendant should not be forced to pay an amount far above the current market rate, nor should the plaintiff receive a windfall. Special Session AB 14/SB 14 ensures that the interest rate is fair for both plaintiffs and defendants.

(over)

Conclusion

By pegging Wisconsin's interest on judgments to the Federal Reserve prime rate, plus one percent, Special Session AB 14/SB 14 ensures that plaintiffs can recover interest at a rate that fairly reflects the market, while also ensuring that defendants pay a reasonable rate.

TO: Chair Zipperer and Members of the Committee
FROM: Public Interest Law Section of the State Bar
RE: Special Session Senate Bill 14
DATE: October 26, 2011

The Public Interest Law Section of the State Bar of Wisconsin opposes Special Session Senate Bill 14. The lawyers of the Public Interest Law Section serve the most financially vulnerable of Wisconsin citizens. We prosecute claims against individuals and businesses who engage in unfair and dishonest business practices in violation of Wisconsin's consumer protection statutes and regulations.

Special Session Senate Bill 14 is an attempt to create an inequitable and discriminatory system for judgment and settlement offer interest rates in Wisconsin, dependent on the type of claims involved in the case. Someone who has proven that he or she was injured by a merchant's violations of the Wisconsin Consumer Act (Chapters 421 to 427 of the Wisconsin Statutes) or someone who has proven he or she was injured in a car accident, will recover a fraction of the current statutory interest rate on a judgment or statutory settlement offer. However, a creditor who obtains a judgment against the same consumer based on a transaction governed by the Wisconsin Consumer Act, or for any other type of debt, will be entitled to collect interest at the current 12 % rate on that judgment.

Two of the stated purposes of the Wisconsin Consumer Act are "to protect customers against unfair, deceptive, false, misleading and unconscionable practices by merchants" and "to permit and encourage the development of fair and economically sound consumer practices in consumer transactions". Wisconsin Statute § 421.102(2). By enacting the Wisconsin Consumer Act, Wisconsin has encouraged and required fair and honest business dealings with its citizens. We should not give merchants violating this law a discount on judgment and settlement offer interest rates.

Special Session Senate Bill 14 would institutionalize a system which blatantly discriminates against those least able to afford to pay judgment interest. The Public Interest Law Section urges the members of this committee not to support Special Session Bill 14.

Attorney Mary C. Fons
On Behalf of the Public Interest Law Section
State Bar of Wisconsin

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